

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

DUSTY W. BARGER, also known as Dusty W. Leetch,)	Cause No. CV 11-57-H-DWM-RKS
)	
Petitioner,)	
)	
vs.)	FINDINGS AND RECOMMENDATION
)	OF U.S. MAGISTRATE JUDGE
STATE OF MONTANA;)	
ATTORNEY GENERAL OF THE)	
STATE OF MONTANA,)	
)	
Respondent.)	

On September 30, 2011, Petitioner Dusty Barger filed this action seeking a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a state parolee proceeding pro se.

The instant petition is Petitioner's second under § 2254. On December 6, 2010, he filed a petition alleging the same claim of diplomatic immunity alleged in the instant petition. On January 12, 2011, the first petition was denied for lack of merit – and not, as Petitioner represents, because he failed to prove his identity. A certificate of appealability was also denied. Petitioner did not appeal. *See Barger v.*

Mahoney, No. CV 10-53-H-DWM-RKS (D. Mont. judgment entered Jan. 12, 2011).

This Court lacks jurisdiction to consider Petitioner's claim. 28 U.S.C. § 2244(b)(3)(A); *Burton v. Stewart*, 549 U.S. 147, 149 (2007) (per curiam). In addition, because the petition is frivolous, transfer to the Court of Appeals is not in the interest of justice. 28 U.S.C. § 1631. Dismissal is the appropriate course of action.

A certificate of appealability is not warranted because the lack of jurisdiction is plain and because Petitioner has not shown he was deprived of any right, much less a constitutional one. 28 U.S.C. § 2253(c)(2).

Based on the foregoing, the Court enters the following:

RECOMMENDATION

1. The Petition (doc. 1) should be DISMISSED for lack of jurisdiction.
2. The Clerk of Court should be directed to enter by separate document a judgment in favor of Respondents and against Petitioner.
3. A certificate of appealability should be DENIED.

**NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

Pursuant to 28 U.S.C. § 636(b)(1), Petitioner may serve and file written objections to this Findings and Recommendations within fourteen (14) days of the date entered as indicated on the Notice of Electronic Filing. A district judge will

make a de novo determination of those portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

Petitioner must immediately notify the Court of any change in his mailing address by filing a “Notice of Change of Address.” Failure to do so may result in dismissal of his case without notice to him.

DATED this 3rd day of October, 2011.

/s/ Keith Strong
Keith Strong
United States Magistrate Judge